

Below is an Opinion of the Court.

Ronald L. Dunn

RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
BRADLEY RAY WARKENTIN, ) No. 10-35332-rld11  
Debtor. ) MEMORANDUM OPINION

On July 5, 2011, I held a hearing ("Hearing") on the debtor Bradley Ray Warkentin's ("Mr. Warkentin") objection to Claim No. 10 (amended) ("Objection") of One West Bank, FSB ("One West"). Following argument from counsel for the parties, I took the matter under advisement.

Since the Hearing, I have reviewed the Objection and the Response to Objection to Claim ("Response") filed by One West, as well as applicable legal authorities. I also have taken judicial notice of the docket and documents filed in Mr. Warkentin's chapter 11<sup>1</sup> case, case number 10-35332-rld11, for purposes of confirming and ascertaining facts

<sup>1</sup> Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 not reasonably in dispute. See Federal Rule of Evidence 201; In re  
2 Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. PA 2006).

3 This Memorandum Opinion sets forth my fact findings and  
4 conclusions of law in light of the evidentiary record before me pursuant  
5 to Fed. R. Civ. P. 52(a), applicable with respect to this contested  
6 matter pursuant to Rules 7052 and 9014.

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8 Factual Background

9 The facts relevant to this matter are not in dispute. On or  
10 about August 8, 2006, Mr. Warkentin executed and delivered a Promissory  
11 Note ("Note") in favor of American Mortgage Network, Inc., dba American  
12 Mortgage Network of Oregon ("American Mortgage") in the principal amount  
13 of \$224,000. Payment of the Note was secured by a deed of trust on  
14 certain real property (the "Property") located in Bend, Oregon. One West  
15 is the successor in interest to American Mortgage.

16 Mr. Warkentin filed his chapter 11 petition on June 7, 2010.  
17 See Docket No. 1. In his Schedules A and D, Mr. Warkentin valued the  
18 Property at \$90,000. He included One West as a secured creditor in  
19 Schedule D, with a security interest in the Property valued at \$90,000  
20 and an unsecured claim for \$134,000. On June 14, 2010, Mr. Warkentin  
21 filed and served on One West a motion to value the Property ("Valuation  
22 Motion") at \$90,000. See Docket No. 18. One West did not file a  
23 response to the Motion, and on July 7, 2010, an order was entered  
24 granting the Valuation Motion. See Docket No. 31.

25 On September 24, 2010, One West filed a proof of claim,  
26 claiming a secured claim with respect to the Property ("Claim") in the

1 total amount of \$227,824.63, calculated as of the petition date. See  
2 Claim 10-1.

3 On November 16, 2010, Mr. Warkentin filed his initial draft  
4 Plan of Reorganization ("Initial Plan"). See Docket No. 84. In the  
5 Initial Plan, Mr. Warkentin included One West in two classes: Class 13 to  
6 be treated as secured to the extent of \$90,000 and to receive payments of  
7 \$483.14 a month, at 5% interest amortized over 30 years; and Class 14 to  
8 be treated as unsecured to the extent of \$137,825 and to receive 60 equal  
9 payments of \$223.00, without interest, in full satisfaction of One West's  
10 unsecured claim.

11 On January 5, 2011, One West filed an election to have its  
12 Claim treated as fully secured, pursuant to § 1111(b)(2) and Rule 3014.  
13 See Docket No. 94.

14 On January 28, 2011, Mr. Warkentin filed his Second Amended  
15 Plan of Reorganization ("Second Plan"). See Docket No. 107. In the  
16 Second Plan, One West was classified in a single class, with its Claim to  
17 bear interest at the rate of 5% per annum and to be paid in monthly  
18 payments of \$483.14 for 360 months, with a further balloon payment of  
19 \$53,894.23 to be paid in the 361st month. One West objected to  
20 confirmation of the Second Plan, arguing 1) that it was not feasible; 2)  
21 that it was not "fair and equitable" for purposes of § 1129(b); 3) that  
22 it did not provide for payment of property taxes and insurance with  
23 respect to the Property; and 4) that the proposed 5% interest rate was  
24 too low, among other things. See Docket No. 126. One West's objection  
25 to confirmation of the Second Plan was filed after the deadline for  
26 filing objections to the Second Plan and the related disclosure statement

1 set in the scheduling order for the confirmation hearing ("Confirmation  
2 Hearing"). See Docket No. 99.

3 The Confirmation Hearing was held on March 21, 2011. At the  
4 Confirmation Hearing, after hearing testimony and argument, I struck the  
5 late filed objection of One West and confirmed the Second Plan, with  
6 modifications as ordered at the Confirmation Hearing. See Docket No.  
7 130. An order granting Mr. Warkentin's motion to strike the late filed  
8 objection of One West was entered on March 29, 2011. See Docket No. 131.

9 An Order Confirming Plan ("Confirmation Order"), prepared by  
10 counsel for Mr. Warkentin, was entered on March 31, 2011. See Docket No.  
11 132. In the Confirmation Order, I allowed One West's claim "as a secured  
12 claim in the full amount of Proof of Claim No. 10, i.e. \$227,824.63." In  
13 addition, the monthly payment amount to One West was increased to  
14 \$554.15, with the balance owing on the claim to be "paid not later than  
15 361 months after the Effective Date of the Plan."

16 On April 22, 2011, One West filed an amended proof of claim  
17 (see Claim 10-2), increasing its secured claim to \$228,874.63 ("Amended  
18 Claim"). Although the Amended Claim is only \$1,050 greater than the  
19 amount of One West's claim that I allowed in the Confirmation Order, One  
20 West represents that the Amended Claim "includes a total of \$1,350.00 in  
21 post-petition attorney's fees and costs." Response, Docket No. 143, at  
22 p. 1.

23 On May 9, 2011, Mr. Warkentin filed the Objection, objecting to  
24 the Amended Claim because it included postpetition attorney's fees. See  
25 Docket No. 137. Mr. Warkentin argues that it is not appropriate for One  
26 West to claim postpetition attorney's fees because it is undersecured,

1 citing § 506(b). Mr. Warkentin recognizes that One West elected to have  
2 its entire claim treated as secured pursuant to § 1111(b), but he  
3 essentially argues that is immaterial because the value of the Property  
4 is less than the claim amount. Mr. Warkentin did not object to the  
5 attorney's fee claim based on reasonableness.

6 One West filed its Response on June 10, 2011, arguing that its  
7 Amended Claim including postpetition attorney fees was appropriate,  
8 primarily relying on the Ninth Circuit's decision in SNTL Corp. et al. v.  
9 Centre Ins. Co. (In re SNTL Corp.), 571 F.3d 826 (2009). See Docket No.  
10 143. Mr. Warkentin elected not to file a reply memorandum.

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12 Jurisdiction

13 I have core jurisdiction to consider and decide the Objection  
14 under 28 U.S.C. §§ 1334 and 157(b)(2)(B).

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16 Discussion

17 The Objection raises issues as to the interaction of an  
18 esoteric provision of the Bankruptcy Code, § 1111(b)(2), and more  
19 familiar provisions. This is the first time that I have considered the  
20 impact of § 1111(b)(2) in this context, and I choose to write because I  
21 expect that it will be encountered more frequently in a continuing  
22 depressed real estate market.

23 Mr. Warkentin argues that his Objection to One West's Amended  
24 Claim should be sustained because it is inappropriate to allow a claim  
25 for postpetition attorney fees to an undersecured creditor, citing

26

1       § 506(b).<sup>2</sup> Section 506(b) provides:

2           To the extent that an allowed secured claim is secured  
3           by property the value of which, after any recovery  
4           under subsection (c) of this section, is greater than  
5           the amount of such claim, there shall be allowed to  
6           the holder of such claim, interest on such claim, and  
7           any reasonable fees, costs, or charges provided for  
8           under the agreement or State statute under which such  
9           claim arose.

10         Generally, postpetition attorney's fees and costs will not be allowed as  
11        part of a secured claim unless the claim is "oversecured," meaning that  
12        the value of collateral securing the claim exceeds the amount of the  
13        claim. See 4 Collier on Bankruptcy ¶ 506.04 (Alan N. Resnick and  
14        Henry J. Sommer, eds., 16th ed.) ("Collier on Bankruptcy").

15         The Ninth Circuit Bankruptcy Appellate Panel, affirmed by the  
16        Ninth Circuit, has concluded that § 506(b) "specifies what may be  
17        included in a secured claim" but is not dispositive as to whether a  
18        postpetition claim for attorney's fees and costs can be allowed as an  
19        unsecured claim. In re SNTL Corp., 571 F.3d at 842-43. See, e.g.,  
20       Omect, Inc. v. Burlingame Capital Partners II, L.P. (In re Omect, Inc.),  
21       368 B.R. 882, 885 (Bankr. N.D. CA 2007); In re Tricca, 196 B.R. 214, 219-  
22       20 (Bankr. D. MA 1996) ("[Section] 506(b) does not create additional  
23        exceptions to the allowance of claims; rather it only provides for the  
24        classification of allowed claims as secured or unsecured.").

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25        <sup>2</sup> Under Oregon law, in a dispute between parties with respect to a  
26        contract that provides specifically that fees and costs incurred to  
enforce provisions of the contract will be awarded, the prevailing party  
is entitled to "reasonable" attorney's fees. See O.R.S. § 20.096(1). As  
noted above, Mr. Warkentin does not challenge the reasonableness of the  
fees and costs claimed by One West in its Amended Claim.

Claim allowance is the province of § 502. Section 502(a) provides that a claim is allowed unless a party in interest objects. Section 502(b) provides that if a claim objection is filed by a party in interest, the court, after notice and a hearing, will determine the amount of the claim and "shall allow such claim in such amount," subject to specified exceptions.<sup>3</sup> None of the specified exceptions applies to

<sup>3</sup> The specific exceptions are as follows:

- (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
- (2) such claim is for unmatured interest;
- (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
- (4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
- (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523 (a)(5) of this title;
- (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—
  - (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—
    - (i) the date of the filing of the petition; and
    - (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
  - (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
- (7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—
  - (A) the compensation provided by such contract, without acceleration, for one year following the earlier of—
    - (i) the date of the filing of the petition; or
    - (ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
  - (B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(continued...)

1 One West's \$1,350 claim for postpetition attorney's fees and costs in  
2 this case.<sup>4</sup>

3 As the Ninth Circuit Bankruptcy Appellate Panel, again affirmed  
4 by the Ninth Circuit, determined in In re SNTL Corp., "we 'must find a  
5 basis in section 502 to disallow a claim, and absent such basis, we must  
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7 <sup>3</sup>(...continued)

8 (8) such claim results from a reduction, due to late payment, in the  
9 amount of an otherwise applicable credit available to the debtor in  
10 connection with an employment tax on wages, salaries, or commissions  
11 earned from the debtor; or

12 (9) proof of such claim is not timely filed, except to the extent tardily  
13 filed as permitted under paragraph (1), (2), or (3) of section 726 (a) of  
14 this title or under the Federal Rules of Bankruptcy Procedure, except  
15 that a claim of a governmental unit shall be timely filed if it is filed  
before 180 days after the date of the order for relief or such later time  
as the Federal Rules of Bankruptcy Procedure may provide, and except that  
in a case under chapter 13, a claim of a governmental unit for a tax with  
respect to a return filed under section 1308 shall be timely if the claim  
is filed on or before the date that is 60 days after the date on which  
such return was filed as required.

16 <sup>4</sup> The only exception that arguably might have some application is  
17 § 502(b)(9), which provides for disallowance of claims that are not  
18 timely filed. Although the Claim was filed timely, the Amended Claim was  
filed after the claims bar date of October 27, 2010. See Docket No. 7.

19 Customarily, claimants have been allowed to amend or modify  
20 their claims to reflect increases or decreases in amount,  
21 additional theories supporting the basis of the claim or any  
other information relevant to the existence and amount of the  
claim. In fact, the official form includes a check-box  
22 indicating that a proof of claim may be amending an earlier  
claim.

23 4 Collier on Bankruptcy ¶ 502.03[10][d]. If the Amended Claim were, in  
24 effect, a "new" claim, increasing the Claim by a material amount, the  
analytical result might be different. See, e.g., In re CF & I  
Fabricators of Utah, Inc., 148 B.R. 332, 343 (Bankr. D. UT 1992).  
25 However, amending the Claim of \$227,824.63 to add a claim for  
postpetition attorney's fees and costs that increases the Amended Claim  
26 amount by a total of \$1,050.00 is not a material enough change to invoke  
the § 502(b)(9) exception.

1 allow it.'" 571 F.3d at 838-39 (quoting Wells Fargo Fin. Acceptance v.  
2 Rodriquez (In re Rodriquez), 375 B.R. 535, 545 (9th Cir. BAP 2007).  
3 Since no such basis in terms of an exception to allowance of a claim  
4 under § 502(b) applies here, and Mr. Warkentin has not raised any issue  
5 as to the amount of One West's claim for postpetition attorney's fees and  
6 costs, I conclude that One West's claim for postpetition attorney's fees  
7 and costs in the amount of \$1,350 should be allowed.<sup>5</sup> The question  
8 remains as to whether it should be allowed as unsecured, or as secured  
9 pursuant to § 1111(b)(2).

10 Section 1111(b)(2) provides that if treatment of a claim under  
11 said subsection is elected, "then notwithstanding section 506(a) of this  
12 title, such claim is a secured claim to the extent that such claim is  
13 allowed." By its terms, § 1111(b)(2) does not require that a claim be  
14 allowed as secured to benefit from the election. It clearly provides  
15 that the claim simply be "allowed." The result seems incongruous, but  
16 the statutory language unequivocably states that if I allow a claim, and  
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18       <sup>5</sup> At the Hearing, counsel for Mr. Warkentin did argue that the terms  
19 of the confirmed plan might support the Objection. As noted above, the  
20 Confirmation Order included a provision allowing One West's claim "as a  
21 secured claim in the full amount of Proof of Claim No. 10, i.e.  
22 \$227,824.63." However, Mr. Warkenton did not file an objection to One  
23 West's Claim in advance of the Confirmation Hearing, and the amount of  
24 One West's claim was not contested at the Confirmation Hearing. In these  
25 circumstances, although it is interesting that counsel for Mr. Warkentin  
26 included a provision as to allowance of One West's secured claim in the  
Confirmation Order, it is not "law of the case" to preclude the filing  
and ultimate allowance of the Amended Claim. See Federal Deposit Ins.  
Corp. v. Kipperman (In re Commercial Money Center, Inc.), 392 B.R. 814,  
832 (9th Cir. BAP 2008) ("For the law of the case doctrine to apply, the  
issue must have been decided, either expressly or by necessary  
implication." (Emphasis added)).

1 an 1111(b) election appropriately is made, the claim is a secured claim.

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3 CONCLUSION

4 I have determined that One West's claim for postpetition  
5 attorney's fees and costs is allowed in the amount claimed. Accordingly,  
6 under the express terms of § 1111(b)(2), I will overrule the Objection  
7 and allow the full amount of the Amended Claim as secured. I will enter  
8 an order consistent with this Memorandum Opinion contemporaneously.

9 # # #

10 cc: Bradley Ray Warkentin  
11 Anthony V. Albertazzi  
Jennifer L. Aspaas

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